Deciding Whether to Unmask—One Size Does Not Fit All

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On May 13, 2021, CDC Director Rochelle Walensky surprised many in the business community by announcing that “Anyone who is fully vaccinated can participate in indoor and outdoor activities, large or small, without wearing a mask or physical distancing.” This announcement came with caveats, and the CDC updated its guidance on its website on May 16, 2021. To review the CDC Guidance, click https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html.

The CDC Guidance provides that “Fully vaccinated people can resume activities without wearing a mask or physically distancing, except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance.”

This announcement has caused businesses to reexamine their masking and social distancing policies in an effort to determine how best to proceed. The decision of whether to require employees and/or customers to continue to wear masks and whether and how to determine who is vaccinated is a complicated inquiry, and the fact that different businesses are taking different approaches illustrates our recommendation that **one size does not fit all**. The CDC reports that as of May 18, 2021, 37.5% of the U.S. population has been fully vaccinated, and the percentage of persons having received at least one shot is about 10% higher. However, the rate of vaccinations varies widely from state to state (Maine is 49.77% fully vaccinated, as compared to Mississippi which is 26.16% fully vaccinated, with Kansas at 36.53% and Missouri at 32.67% falling in the middle). Also, vaccination rates vary widely within each state.

The purpose of this Client Alert is to list some of the most important factors to be considered in determining the best approach for your business. Keep in mind that potential best practices today might not be best practices tomorrow, and that new guidance from the CDC, OSHA and EEOC is likely to be forthcoming. Different rules may be appropriate for different employees and for employees in different locations and different work environments.

CDC Guidance is Not Binding but Businesses are Bound by State and Local Laws

Some states, cities and other governmental units and bodies continue to require masks and social distancing, so you need to continue to comply with these requirements if in a jurisdiction or building that continues to require masking and/or social distancing.

OSHA Updates Guidance

On January 29, 2021 OSHA issued 12 pages of detailed Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace. The key takeaways from that Guidance are that Employers should do the following:

- Conduct a hazard assessment.
- Identify control measures to limit the spread of the virus.
- Adopt policies for employee absences that don't punish workers as a way to encourage potentially infected workers to remain home.
- Ensure that coronavirus policies and procedures are communicated to both English and non-English speaking workers.
- Implement protections from retaliation for workers who raise coronavirus-related concerns.
- Make a COVID-19 vaccine or vaccination series available at no cost to all eligible employees and provide information and training on the benefit and safety of vaccinations.
- Do not distinguish between vaccinated workers and those who are not vaccinated for purposes of protective measures.

On May 17, 2021 OSHA updated that guidance by stating: "The Centers for Disease Control and Prevention (CDC) has issued new guidance relating to recommended precautions for people who are fully vaccinated, which is applicable to activities outside of healthcare and a few other environments. OSHA is reviewing the recent CDC guidance and will update our materials on this website accordingly. Until those updates are complete, please refer to the CDC guidance for information on measures appropriate to protect fully vaccinated workers." See https://www.osha.gov/coronavirus/safework.

Upcoming EEOC Guidance

The current EEOC guidance on COVID and the ADA, the Rehabilitation Act and other EEO laws was last updated December 16, 2020, but in the last week the EEOC updated its website to note that the EEOC is considering the impact of the CDC's latest guidance on its technical assistance guidance, and we expect updated guidance from the EEOC to be forthcoming. See: https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

Practical Considerations in Deciding Whether to Allow Fully Vaccinated Employees and/or Customers to Dispense with Masks and/or Social Distancing

- Employers subject to OSHA continue to have a duty to provide your employees with a safe workplace.
- Employers and businesses must still monitor and follow state and local laws and ordinances which require masking and/or social distancing.
- Also, employers must monitor and follow any state or local laws that restrict an employer's right to make decisions based on vaccination status. For example, there is a bill pending in Texas that would prohibit discrimination based on an employee's vaccine status. In New Jersey, there is a bill pending that would make it unlawful to ask a person if they have received a COVID-19 vaccine or to show proof of having received a COVID-19 vaccine. There is also a pending bill in New York that would prohibit requiring a person to show proof of vaccination.

- As an employer, you can continue to require your employees to wear masks and/or social distance even if it is not required by law.
- We generally recommend that employers encourage their employees to get vaccinated and continue to wear masks even if fully vaccinated for the time being, when they are not socially distanced from their co-workers.
- Note that if you decide to allow fully vaccinated employees to ditch their masks, it may encourage more employees to get vaccinated, but remember that some employees may claim that they not be able to be vaccinated for medical, disability or religious reasons.
- In deciding whether to allow fully vaccinated employees to forego wearing a mask, consider the specifics of your workforce including to what extent employees are required to work in close proximity to each other, or whether employees are generally working at least 6 feet apart or in separate offices or cubicles with some kind of protective barriers, company culture, the percentage of employees vaccinated, the nature and type of work performed, the prevalence of COVID in the area, and whether the employee has frequent contact with children or other persons who are likely to be unvaccinated.
- Be prepared, regardless of your decision, for some potential employee pushback.
    - Some employees, especially those with compromised immune systems, may feel that relaxing masking requirements puts them at risk and they may seek some kind of reasonable accommodation to protect their health.
    - Some employees who are fully vaccinated will push for being allowed to ditch their masks and some fully vaccinated employees will want to continue to wear a mask for various reasons.
    - Some employees who are not fully vaccinated will be inclined not to wear a mask and may even lie about whether they are vaccinated or not if you operate on the honor system.
- How to determine whether an employee is fully vaccinated?
    - The most conservative approach is to require anyone wanting to be excused from wearing a mask to provide a copy of or photo of their COVID vaccination card to someone in HR, who will add that person’s name to the list of employees excused from wearing a mask.
    - The next most conservative approach is to have employees certify in writing that they are fully vaccinated—a variation on the honor system. If this approach is taken, an employer could reserve the right to require proof of vaccination to address the situation where an employer has or develops reasonable suspicion that the employee is not fully vaccinated.
    - The least conservative approach is to announce that fully vaccinated employees no longer need to wear a mask when they are not socially distancing and rely on the honor system.
- If you decide to allow fully vaccinated employees to discontinue wearing masks, then we recommend the following:
    - Information regarding who is vaccinated against COVID be treated as confidential medical information which should only be shared with those with a business need for such information, such as HR and management enforcing your masking policy.
    - If you are going to rely on the honor system, consider whether to warn employees that a false representation regarding vaccination will result in disciplinary action.
    - Make clear to employees that wearing a mask does not mean that an employee is not vaccinated since fully vaccinated employees can choose to wear a mask for various reasons.
    - Make clear to employees that you respect their privacy and that they should not ask co-workers if they are vaccinated or why they are wearing a mask. Indeed, HR also needs to be careful not to inquire as to why an employee is not vaccinated because that may constitute an illegal medical inquiry not justified by business necessity.
    - Make clear to employees that if they have a concern about the new masking policy, that they bring their concerns to HR and monitor employee conduct for bullying or other prohibited conduct regarding vaccination status.

    - If an employee requests some type of reasonable accommodation based on a disability, whether it is a request for remote work or a request not to wear a mask because of a medical reason that makes wearing a mask unreasonable, engage in the interactive process to determine whether the person has a disability that can be reasonably be accommodated.
    - Don’t allow vaccination status to be used to discriminate against workers on a protected basis such as disability, sex, age or race.
    - If employees or some employees interact with customers or vendors, consider whether to require masking in the presence of customers or vendors or at a minimum if the customer or vendor requests it.
    - Remember, if you have a union, determine if you need to negotiate the issue with the union before instituting a new masking policy.
- Consider what is the best rule for your business with respect to whether customers or vendors will be required to wear masks.

We urge our clients and friends to continue to monitor new CDC, OSHA and EEOC guidance and changing state and local legal requirements and seek legal advice if you have questions about masking or other COVID matters. We are also prepared to assist you in developing policies and answering your questions regarding all types of COVID related issues.*This article is general in nature and does not constitute legal advice. Please note that new guidance is being provided by authorities on a daily basis so please monitor new developments and guidance, including but not limited to our firm’s COVID-19 Resource Center. Readers with legal questions should consult the authors, John Vering (jvering@sb-kc.com), John Neyens (jneyens@sb-kc.com) Shannon Johnson (sjohnson@sb-kc.com), Mark Opara (mopara@sb-kc.com), or other shareholders in Seigfreid Bingham’s Employment Law Group, including: Brenda Hamilton, Julie Parisi, or Christopher Tillery or your regular contact at Seigfreid Bingham at 816-421-4460*